



U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

Honorable Paul A. Denett
Administrator
Office of Federal Procurement Policy, OMB
Eisenhower Executive Office Building
1650 Pennsylvania Avenue NW, Room 263
Washington, DC 20503

May 23, 2007

Re: Proposed Changes to the Federal Acquisition Regulation

Dear Mr. Denett:

I am writing to propose some additions and modifications to the Federal Acquisition Regulation (FAR) that the Department of Justice believes are consistent with the purpose of the FAR System "to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives." To better fulfill this purpose, we propose that the FAR be modified to require that contractors establish and maintain internal controls to detect and prevent fraud in their contracts, and that they notify contracting officers without delay whenever they become aware of a contract overpayment or fraud, rather than wait for its discovery by the government.

Our proposal is modeled on existing requirements found in other areas of corporate compliance such as the Sarbanes-Oxley Act of 2002, and it expands slightly on the Contractor Standards of Conduct set out by the Department of Defense at DFARS 203.7000. We have been careful not to ask contractors to do anything that is not already expected of their counterparts in other industries, and we have avoided imposing any unnecessary burdens on small businesses or creating any expensive paper work requirements. We note also that the National Reconnaissance Office (NRO) through a contract clause recently has begun requiring its contractors to disclose contract fraud and other illegal activities. The NRO reports that this requirement has improved its relationships with its contractors and enhanced its ability to prevent and detect procurement fraud.

While we recognize that many government contractors have taken steps to establish corporate compliance programs, our experience suggests that few have actually responded to the invitation of the Department of Defense (DOD) that they report or voluntarily disclose suspected instances of fraud. Moreover, unlike healthcare providers or financial institutions, there is at present no general requirement that contractors alert the government immediately as a matter of routine when overpayments or fraud are discovered. We believe that if the FAR were more explicit in requiring such notification, it would serve to emphasize the critical importance of integrity in contracting. In deference to the expertise of the Office of Federal Procurement Policy ("OFPP"), the attached outline prepared by our prosecutors merely suggests the recommended language and possible locations in the FAR for these proposed changes.

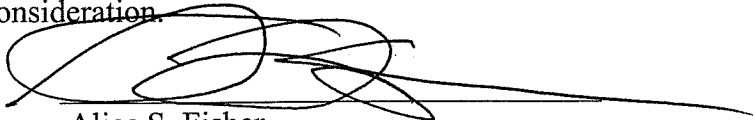
In October, the Deputy Attorney General and I announced the formation of the National Procurement Fraud Initiative. To fulfill the goals set by that initiative, we have committed ourselves to working for the consideration of any policy and regulatory change that would effectively reduce the exposure of federal contracts to fraud and corruption. I greatly appreciate the participation of your Deputy, Rob Burton, in this effort.

As you know, the 1980's witnessed significant innovations in the federal procurement system. Many of those reforms, including corporate compliance programs and corporate self-governance, were adopted with industry cooperation, and were later incorporated into evolving regulatory schemes in other business sectors and industries. In fact, the United States Sentencing Guidelines' treatment of corporations, adopted in 1991, borrowed heavily from reforms that were first instituted for government contractors in 1986. However, since that time, our government's expectations of its contractors has not kept pace with reforms in self-governance in industries such as banking, securities and healthcare.

Consistent with OFPP's existing procedures, I ask that you take the necessary steps to open a FAR case and expedite the review of these proposed changes. Note the proposal excludes small businesses from the administrative demands associated with establishing a compliance program, but we believe all contractors, regardless of size, should be expected to report fraud when they become aware of it. I have asked Steve Linick, the Director of our National Procurement Fraud Initiative, to work with you and your staff as this matter proceeds. Steve can be reached at 202-353-1630, or at steve.linick@usdoj.gov.

Finally, I have been advised that the review and approval process in the defense and civilian agencies can sometimes be lengthy, so I am hopeful that you will pursue all means at your disposal to fast track the consideration of this proposal. I believe reforms of this sort present a sufficiently "urgent and compelling circumstance" to support a determination that any rule issuance resulting from this process be considered as an "interim" rule.

Thank you very much for your consideration.



Alice S. Fisher
Assistant Attorney General
Criminal Division, Department of Justice

cc. Paul J. McNulty, Deputy Attorney General
Rachel Brand, Assistant Attorney General
Robert Burton, Deputy Administrator, OMB
Steve A. Linick, Director, NPFTF
National Procurement Fraud Initiative Members

OUTLINE OF DOJ's PROPOSED FAR CHANGES

As part of its National Procurement Fraud Initiative, the Department of Justice is proposing several changes to the Federal Acquisition Regulation (FAR):

1. Modify FAR Part 3 or 9 to provide that as part of a contractor's obligation to maintain "a satisfactory record of integrity and business ethics," all contractors with more than \$5 million in federal contracts in the prior two consecutive calendar years are required to have a compliance program or other internal controls to detect and prevent fraud and other criminal violations as described in the United States Sentencing Guidelines, Section 8B2.1 Effective Compliance and Ethics Program, Attachment A. We intend to propose similar language in our written comments to FAR case 2006-007, which currently is pending at OMB.
2. Expand on FAR Part 3 or Part 9 with a new section "Contractor Integrity Reporting" requiring that all responsible contractors:
 - a) notify the contracting officer in writing whenever the contractor becomes aware of an event affecting its initial or continuing right to receive any payment(s) under the contract. *{modeled on existing requirements for healthcare providers found at 42 U.S.C. 1320a-7b(3), Attachment B. Essentially, this provision would require a contractor to disclose any overpayments without waiting for government discovery. To limit the scope of this provision, it may be necessary to include a materiality requirement. Currently, it appears that the FAR only requires notification of overpayments for acquisition of commercial items, see FAR 52.212-4(i)(5)}.*
 - b) notify the contracting officer in writing whenever the contractor has reasonable grounds to believe an officer, director, employee, agent, or subcontractor of the contractor may have committed a violation of federal criminal law in connection with the award or performance of any government contract or subcontract. *{modeled on Suspicious Activity Reports required by the Office of the Comptroller of the Currency found at 12 CFR 21.11, Attachment C, the Anti-kickback disclosures currently required by FAR 3.502-2(g) and Sarbanes-Oxley reporting requirements, Section 302(a)(5), Attachment D. To limit the scope of this provision, it may be necessary to include guidance that defines terms such as "reasonable grounds"}.*
3. Modify FAR 9.406-2, Causes for Debarment and 9.407-2 Causes for Suspension to include "knowing failure to timely disclose an overpayment or violation of federal criminal law as described above."
4. The contracting officer shall insert a clause at FAR 52.203 reflecting these requirements in all its solicitations and contracts.
5. The above language requiring notification of overpayments and fraud should be included

in all subcontracts valued over \$1 million.

6. Note that the requirement for a compliance program is limited in paragraph 1 above to contractors with over \$5 million in contracts for two consecutive years in order to exclude small contractors from any unnecessary administrative burden. The proposal does not relieve such contractors from the duty to report fraud as described in paragraph 2 above. OFPP may elect to increase or decrease that threshold amount based on their experience in addressing small business needs in other contractual requirements. There may also be a request to exclude so-called commercial contracts from the compliance program requirement, but there would be no reason to exclude those contractors from the reporting requirement.